Supreme Court, U.S.
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(1)

In the
Supreme Court of the United States

SUSAN M. FOX,

Petitioner,

v.

TRAVERSE CITY AREA PUBLIC SCHOOLS BOARD OF EDUCATION, TRAVERSE CITY AREA PUBLIC SCHOOLS, CHRISTINE M. DAVIS, and ROBERT T. PETERS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

CARL J. MARLINGA
Counsel of Record
MARLINGA LAW GROUP, PLLC
43550 ELIZABETH ROAD
CLINTON TOWNSHIP, MI 48036
(586) 468-1783
mail@marlingalaw.com

Attorneys for Petitioner

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

(1) Whether a public elementary school special education teacher who complains that her job assignment illegally reduces the number of hours that a school district should be providing to special needs students is speaking "as a citizen" on a matter of public concern so that her speech is protected by the First Amendment under this court's decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

(2) Whether the inquiry into the protected status of speech remains one purely of law as stated in this court's decision in *Connick v. Myers*, 461 U.S. 138 (1983) or has *Garcetti* transformed it into a mixed question of fact and law so as to permit a jury to determine whether one is speaking "as a citizen".

(3) Whether this court should revisit its decision in *Garcetti* to limit its holding to persons whose public employment involves the exercise of policy-making or confidential or discretionary duties on behalf of elected officials, recognizing that there is a compelling interest in promoting free speech among government employees who perform merely ministerial functions.

CORPORATE DISCLOSURE STATEMENT

Petitioner Susan Fox is an individual. Respondent Traverse City Area Public Schools is a Michigan municipal corporation, but it is not a publicly traded stock company. Respondent Traverse City Area Public Schools Board of Education is a group of elected individuals. Respondents Christine M. Davis and Robert T. Peters are individuals.

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Susan Fox, plaintiff in the district court, respectfully petitions this court for a writ of certiorari to review the judgment of the U.S. Circuit Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The decision of the Court of Appeals is reported at 605 F.3d 345 (6th Cir. 2010) and is reproduced in the Appendix herein at Pet. App.1a to 12a. The decision of the U.S. District Court for the Western District of Michigan is not reported, since it was orally announced from the bench, but the transcript is reproduced in the Appendix Pet. App. 18a – 29a.

JURISDICTION

The judgment of the court of appeals was issued May 17, 2010. Pet. App. 13a – 14a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Civil Rights Act of 1871, set forth at 42 U.S.C. § 1983, provides:

> Every person who, under color of any statute ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except

> that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This case brings before this court the issue of when a public school teacher's speech rights are protected under this court's decision in *Garcetti v. Ceballos,* 547 U.S. 410 (2006). It also provides a vehicle for this Court to answer a question which has produced a split in the circuits – as pointed out by the Sixth Circuit's opinion at Pet. App. 10a – 11a (605 F.3d at 350-1) whether the inquiry into the protected status of speech remains one purely of law as stated in *Connick v. Myers,* 461 U.S. 138 (1983), or whether, instead, *Garcetti* has transformed it into a mixed question of fact and law. This case also permits this Court to clarify whether the *Garcetti* test regarding when speech will be protected applies across the board to all public employees, including the public school special education teacher in this case, or whether it would be better to limit the test to public employees, like the assistant district attorney in *Garcetti,* who exercise discretionary duties on behalf of an elected official.

The petitioner, Susan Fox, brought an action under 42 U.S.C. § 1983, alleging that the respondent Traverse City Area Public Schools, acting through the school board and the individual defendants,

terminated her employment because she complained that the size of her teaching caseload prevented her from providing special needs students the hours of instruction that they were entitled to receive from her. Pet. App. 2a. Fox was hired to teach at Blair Elementary School under a probationary contract for the school years 2005-2006 and 2006-2007. In February she was notified that she would not be renewed for the following year. According to the defendants, the non-renewal was because of performance deficiencies dating back to early 2006. Pet. App. 3a. Fox disputed claims that her performance was deficient and maintained that she was terminated for voicing concerns to her supervisors that the size of her teaching caseload exceeded that allowable by law – thereby shorting special needs students their required hours with her. Pet. App. 3a – 4a. Specifically, in the fall of 2006, she was assigned 21 special education students, which is the maximum number allowed by Michigan law. She was also assigned to teach a reading program called "READ 180". This added 13 more special education students, taking her caseload to 34 students per day, and reducing the time that she spent with each special education student. Pet App. 30a – 31a.[1] In September 2006, she complained to Robert Peters that her increased caseload put the district out of compliance with the law. Pet. App. 32a. On September 22, 2006, Kim Urbanski, another supervisor curtly told her in response to Ms. Fox's complaints, "Susan, don't you

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[1] The "Affidavit of Susan M. Fox", referenced here, is reproduced in Petitioner's Appendix, it was filed March 4, 2009, as Doc # 74-5 in the district court

worry about the laws; you worry about your caseload." Pet. App. 33a.

Fox alleged that prior to the time that she complained about the district being not in compliance with the law, she received evaluations from her supervisors, dated 11/29/05, 3/7/06, and 3/23/06, praising her work; but that after she reported this non-compliance with the law to her supervisors, she was met with hostility that ultimately resulted in the notice of non-renewal that she received in February 2007. Pet. App. 4a and 30a – 33a. Fox conceded that she did not file a formal grievance with her union, nor did she voice her concerns over the illegal workload assignment outside of the ordinary chain of command at her school. There was no evidence in the record that reporting non-compliance with the law was part of the job description for a special education teacher, or that such reporting was customarily expected of special education teachers. In fact the admonition of supervisor Kim Urbanski, quoted above, was *some* evidence that the district did not regard the reporting of non-compliance as within the job duties expected of a special education teacher.

The district court granted summary judgment to the defendants on the civil rights claim under 42 U.S.C. § 1983 and dismissed the pendent state-law claims. Pet. App. 2a. The court did not make factual findings on the issue of whether or not Fox's performance was deficient or whether, as Fox claimed, the allegations of deficient performance were merely a pretext covering up the district's dissatisfaction with her because of her insistence on compliance with the law. Pet. App. 24a – 25a. Rather, the district court assumed for the purposes of the motion for summary

judgment that Fox was fired because she spoke out. This was the holding of the district court in granting the motion for summary judgment:

> So let's assume for purposes of the analysis here, and only for purposes of the analysis, that what Ms. Fox says she told her supervisors is what led to the adverse action. I'm making no finding on that. I'm saying let's assume for purposes of the summary judgment analysis that happened.
>
> It seems to me that under Garcetti you have to find that the speech in order to be protected under the first element of the prima facie case would have to be made as a citizen and on matters of public concern, and I think this falters on the "as a citizen" prong of Garcetti, just as I thought in the Meggison case that the plaintiff's claim faltered on the same prong.
>
> There's no dispute here that the statements that Ms. Fox said she made to her supervisors involved directly her complaints about workload. She said, "I shouldn't have this number of people. It's not appropriate under the law." And it related directly to the special ed students in her charge.
>
> It's hard for me to see, frankly, a clearer case of Garcetti applying in the context of a public employee's speech. (Pet. App. 24a – 25a.)

Fox appealed the decision, saying that the district court erred in that there existed a genuine issue of material fact as to whether, in voicing her complaint about her caseload, she was speaking "as a citizen" for purposes of a *Garcetti* analysis with respect to her First Amendment civil rights claim. Pet. App. 4a.

The Sixth Circuit Court of Appeals affirmed, holding that plaintiff had failed to establish that her speech was protected and that, therefore, the defendants were entitled to judgment as a matter of law. Pet. App. 12a. The Sixth Circuit noted in its opinion that the threshold question of whether one is speaking "as a citizen" and on "a matter of public concern" (the *Garcetti* test) was a question that was answered in some circuits by the court as a matter of law, while, in other circuits, it was answered by a jury as a mixed question of fact and law. Pet. App. 10a – 11a. The Sixth Circuit said that it would side with the Fifth, Tenth, and District of Columbia Circuits, holding that this is a question of law, while acknowledging that the Third, Seventh, Eighth, and Ninth Circuits would submit the question to the jury as a mixed question of fact and law. *Id.*

Fox now brings this petition for a writ of certiorari, saying (1) the district court and the court of appeals were wrong in their application of the *Garcetti* test – even assuming that the question was one of law for the court to decide; (2) the district court and the court of appeals should have denied summary judgment since the threshold question of whether one speaks "as a citizen" is quintessentially a question of fact for a jury to decide; and (3) this court should refine the *Garcetti* test to recognize that there should be different tests to determine protected speech of public employees tailored to fit the differing levels of job responsibilities of differing sets of public employees.

REASONS FOR GRANTING THE WRIT

I. ASSUMING THAT THE *GARCETTI* TEST IS AN ISSUE FOR THE COURT ALONE TO DECIDE, WITHOUT A JURY, THE DISTRICT COURT AND THE COURT OF APPEALS MISAPPLIED THE TEST SINCE PLAINTIFF WAS SPEAKING "AS A CITIZEN" ON BEHALF OF THE SPECIAL EDUCATION STUDENTS WHO WERE NOT BEING AFFORDED THE HOURS OF INSTRUCTION TO WHICH THEY WERE ENTITLED UNDER THE LAW.

The question of whether special needs students are receiving legally mandated education services is, without doubt, a matter of public concern. The district court judge impliedly concedes the "matters of public concern" part of the *Garcetti* test in its opinion granting the defendants' motion for summary judgment:

> So let's assume for purposes of the analysis here, and only for purposes of the analysis, that what Ms. Fox says she told her supervisors is what led to the adverse action. I'm making no finding on that. I'm saying let's assume for purposes of the summary judgment analysis that happened.
>
> It seems to me that under Garcetti you have to find that the speech in order to be protected under the first element of the prima facie case would have to be made **as a citizen and on matters of public concern**, and I think **this falters on the "as a citizen" prong of**

> **Garcetti....** (Pet. App. 24a – 25a; emphasis added.)

The clear implication of the district court's statement is that plaintiff's prima facie case would certainly not falter on whether it presents "matters of public concern."

In *Reinhardt v. Albuquerque Public Schools Board of Education,* 595 F.3d 1126 (10th Cir. 2010), the Tenth Circuit Court of Appeals, in a factually similar case, found that a special education teacher (a speech-language pathologist) raised a matter of public concern where she, as the plaintiff here, complained that the defendant school district was not providing the legally required special education services to the students who qualified for those services. The district court granted the defendant school district's motion for summary judgment, holding that under *Garcetti* the plaintiff was not speaking "as a citizen" since her speech was made pursuant to her job duties. The Tenth Circuit reversed, holding that the plaintiff's advocacy on behalf of her students was speech that was not a required part of her job duties. Both the district court and the court of appeals apparently agreed, however, that advocacy on behalf of special needs students was certainly a matter of public concern.

Petitioner recommends the analysis of the Tenth Circuit to this Court because, in petitioner's opinion, it demonstrates a properly reasoned application of the *Garcetti* test even in a circuit which holds that the test is to be applied by the court as a matter of law. As noted both previously and below, there is a split in the circuits with the Fifth, Sixth, Tenth and D.C. Circuits holding that the *Garcetti* test is to be addressed solely

as a matter of law by the court, while the Third, Seventh, Eighth, and Ninth Circuits, hold that the inherent factual issues regarding the scope of one's job duties and the subjective motivations which prompt a person to speak are necessarily questions of fact for a jury. In *Reinhardt*, the Tenth Circuit, without benefit of a jury, applied a factual analysis, which if similarly applied to Fox would require a reversal of the Sixth Circuit in *Fox* without having to address the question of whether a judge or jury should decide the *Garcetti* test. This is the Tenth Circuit's analysis (595 F.3d 1126, 1135-6):

> *Garcetti v. Ceballos* sets the boundaries of "protected" employee speech, and the parties agree that this is the controlling law. Aplt.App. 237. *Garcetti* recognized that employee speech made pursuant to the employee's professional duties is not afforded First Amendment protection. 547 U S. at 421, 126 S.Ct. 1951. We have noted that "[t]he question under *Garcetti* is not whether the speech was made during the employee's work hours, or whether it concerned the subject matter of his employment." *Thomas v. City of Blanchard*, 548 F.3d 1317, 1323 (10th Cir.2008). The key is "whether the speech was made pursuant to the employee's job duties or, in other words, whether the speech was commissioned by the employer." *Id.* (internal quotation marks and citation omitted). Rather than defining a comprehensive framework for defining the scope of an employee's duties, the Supreme Court emphasized that the inquiry is "a practical one," noting that "formal job descriptions often bear little resemblance to the duties an employee actually is expected to

> perform." *Garcetti,* 547 U.S. at 424-25, 126 S.Ct. 1951. Post *Garcetti,* this court has generally identified two factors that suggest an employee was speaking as a private citizen rather than pursuant to her job responsibilities: (1) the employee's job responsibilities did not relate to reporting wrongdoing and (2) the employee went outside the chain of command when reporting the wrongdoing. *See Thomas,* 548 F.3d at 1324-25; *Brammer-Hoelter v. Twin Peaks Charter Acad.,* 492 F.3d 1192, 1204-05 (10th Cir.2007); *Casey v W. Las Vegas Indep. Sch. Dist.,* 473 F.3d 1323, 1330-33 (10th Cir.2007). Ms. Reinhardt's speech – filing the state complaint – satisfies both of these factors

In Fox's case, she satisfies only one of the two factors formulated by the Tenth Circuit; namely, the fact that her job responsibilities did not relate to reporting wrongdoing. It is conceded that Fox did not go outside the chain of command in order to complain about or report the wrongdoing. The fact that she does not satisfy both factors, however, should not be held against her because this Court has already held in *Garcetti* that employees do not have to go outside the office to be afforded First Amendment protection, and that in some cases expressions made totally within the workspace are protected (547 U.S. 410, 420). Therefore, the Tenth Circuit's gloss about going outside the chain of command must be read for what it is; namely, one factor that it likes to consider in its factual analysis, but not a controlling factor, since if applied literally, the Tenth Circuit would be contravening this court's holding in *Garcetti.*

As to the first factor, Reinhardt, like Fox, did not have a job responsibility to complain about or report the district's illegal avoidance of its duties to the students. Reinhardt, like Fox, was not a compliance officer. This is what the Tenth Circuit said with regard to Ms. Reinhardt (595 F.3d 1126, 1136):

> Ms. Reinhardt was not hired to ensure IDEA compliance at Albuquerque public schools. She was hired to provide speech and language services to special education students.

In like manner, Ms. Fox was not hired to ensure compliance at Traverse City Area Public Schools with the number of hours that were to be devoted to special education students. She was hired to be a special education teacher.

Applying the reasoning of the Tenth Circuit in *Reinhardt* (combined with this Court's admonition in *Garcetti* that speech does not lose its protection simply because it remains internal) the proper decision in this case would be to reverse the Sixth Circuit. As to the threshold question of whether this Court should grant the petition for a writ of certiorari, the difference in the result to the plaintiffs in *Reinhardt* and *Fox* calls out for this Court to act. In the one case the appellate court has applied what it believes to be a proper application of this Court's decision in *Garcetti* and has determined that the plaintiff spoke "as a citizen". Yet, in a very similar case an appellate court has applied what it also believes to be a proper application of this court's decision in *Garcetti* and has determined that plaintiff did not speak "as a citizen". In the enforcement of constitutional rights – especially with respect to a right so fundamental as the First

Amendment right of free speech – this difference in result based solely on geography should not be permitted.

II. THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE THE CONFLICT IN THE CIRCUITS AS TO WHETHER THE *GARCETTI* TEST PRESENTS MIXED QUESTIONS OF FACT AND LAW REQUIRING SUBMISSION TO A JURY TO RESOLVE CONTESTED ISSUES OF WHETHER A PUBLIC EMPLOYEE'S SPEECH WAS SPOKEN "AS A CITIZEN".

The Tenth Circuit's opinion in *Reinhardt, supra,* serves as an apt introduction to this part of petitioner's argument, since even though the Tenth Circuit is one of the circuits which regards the application of the *Garcetti* test as one of law for a court to decide, the reasoning of the court brings in a review and weighing of factual issues that are traditionally within the purview of a jury (and, therefore, in an unintended way, argues for the position advanced by the petitioner). Note that its first test is to ascertain whether the employee's job requires the employee to report wrongdoing. This is not an easy task since as this court has observed "the proper inquiry is a practical one," requiring more than mere mechanical reference to "[f]ormal job descriptions [which] often bear little resemblance to the duties an employee actually is expected to perform." *Garcetti,* 547 U.S. at 424-25. To fairly answer this question, it would seem necessary that a district court have the employee's formal job title, formal job description, any applicable informal job descriptions, testimony from the employee and the employer as to whether the reporting of

wrongdoing is customarily considered part of the job, testimony about past practices of similarly situated employees, and testimony of the affected employee as to what motivated him or her to speak.[2] If all of these factual matters are in the record (plus potentially other factual matters that may arise on a case by case basis) then, with such a record, a district court judge might be in a position to fairly answer the question. But with such a myriad of factual nuances inherent in such an inquiry, the answer would be best left to a jury.

The Tenth Circuit's second test, as noted above, if taken literally and applied strictly, contravenes this court's holding in *Garcetti* since this Court has held that it is not necessary that one go outside the internal chain of command to receive protection "as a citizen" for one's speech. This test does not mean that the Tenth Circuit wants to avoid the teachings of this Court on this issue; rather the statement of this second test by the Tenth Circuit shows once again that there are nuances unique to each case which help a finder of fact to determine whether or not a public employee was speaking "as a citizen". By asking whether the employee went outside the internal chain of command, a finder of fact can glean an insight of admittedly some relevance about whether the employee was speaking as a citizen. Certainly, where, when and to whom an employee speaks are important, since it is part of the context necessary to help resolve the question of whether the employee was advocating for a cause or simply griping about his or her job. But there is no

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[2] The district court record in this case is devoid of any evidence relating to these issues

comprehensive list of places, times, audiences, and other factors that can be referenced to answer this question. That is why any attempt to leave the resolution of this inherently fact-intensive question to a judge rather than a jury is a seriously flawed approach.

With regard to Ms. Fox's case, the Sixth Circuit fell into the same error as the Tenth Circuit in thinking that Fox's failure to go outside the internal chain of command was an important or determinative factor. The Sixth Circuit distinguished cases from the Ninth Circuit and Second Circuit, which petitioner had argued were factually similar as arising in the educational context. In *Posey v. Lake Pend Oreille School District,* 546 F.3d 1121 (9th Cir. 2008), the Ninth Circuit reversed the district court's grant of summary judgment on plaintiff's First Amendment claim where the plaintiff, a security specialist, found that his job had been eliminated after he wrote a letter to school district administrators complaining of safety and security breakdowns at his school. In *Cioffi v. Averill Park Central School District,* 444 F 3d 158 (2d Cir. 2006) the Second Circuit reversed the district court's grant of summary judgment where the plaintiff found that his job was abolished after he wrote letters to school district officials and held a press conference criticizing the school district for not reacting strongly enough to hazing incidents involving student football players. In both of these cases the respective courts of appeal held that the district court was in error in finding that the plaintiffs were not speaking "as citizens" under *Garcetti.* The Sixth Circuit in *Fox* distinguished these cases by saying that in both *Posey* and *Ciofi* the plaintiff "made statements outside the ordinary chain of command". (605 F.3d 345, 350.) The

Sixth Circuit also distinguished Fox's case from its previous holding in *See v. City of Elyria,* 502 F.3d 484 (6th Cir. 2007) by saying that the police officer in that case spoke "as a citizen" because his complaints about police department wrongdoing were reported to an outside agency, the FBI, rather than an internal bureau of the police department. Because of that distinction the Sixth Circuit held that, unlike Fox, the plaintiff in *See* made statements "obviously not made pursuant to the plaintiff's official duties " (605 F.3d 345, 349; Pet. App. 5a.) Again, the purpose of this critique of the Sixth Circuit opinion is not so much to point out that the opinion deviates from this Court's teachings in *Garcetti*; rather it is to demonstrate that district courts and courts of appeal are drawing inference from factual inquiries that are too narrow in their scope. If for instance, the police officer in *See* had been fired after making a complaint to internal affairs rather than the FBI, is there any real question that the Sixth Circuit would have said that his firing was justified? There is no doubt that the court would have found a way to determine that his speech was, indeed, protected. Conversely, if the court would have held that the officer could be fired because his speech was made pursuant to his job duties, the injustice of the decision would have pointed out that there is something starkly unjust and unworkable about the test.

The better course is to leave the question of whether one is speaking "as a citizen" to the wise care of a jury Although preferring its determination that the application of the *Garcetti* test is one for a judge, the Sixth Circuit did fairly set forth the split in the circuits – perhaps as an indication to this court that this question was ripe for review (605 F.3d 345, 350):

Finally, we reject the plaintiff's contention that the district court erred in treating the constitutional status of her speech as a matter of law, rather than a question of fact for a jury. Prior to the issuance of its decision in *Garcetti*, the Supreme Court treated "the inquiry into the protected status of speech [as] one of law, not fact." *Connick v. Myers*, 461 U.S. 138, 148 n. 7, 103 S.Ct. 1684, 75 L.Ed.2d (1983). In *Garcetti*, however, the Court held that the question of whether a statement was spoken as a public employee or as a private citizen for First Amendment purposes was "a practical one," requiring a fact-specific inquiry into the "duties an employee actually is expected to perform." *Garcetti*, 547 U.S. at 424-25, 126 S.Ct. 1951. **Unfortunately, whether the Court intended to retreat from the rule in *Connick* is not altogether clear from the language in *Garcetti*.** [Emphasis added.]

As the plaintiff correctly observes, the circuits are divided over "whether the inquiry into the protected status of speech remains one purely of law as stated in *Connick*, or if instead *Garcetti* has transformed it into a mixed question of fact and law." *Posey*, 546 F.3d at 1127. The Third, Seventh, Eighth, and Ninth Circuits have concluded that "whether the speech in question was spoken as a public employee or a private citizen presents a mixed question of fact and law." *Id.* at 1129; *see also Reilly v. City of Atlantic City*, 532 F.3d 216, 227 (3d Cir.2008); *Davis v. Cook County*, 534 F.3d 650, 653 (7th Cir.2008). Other circuits have stated that this remains a "question [] of law for the court to resolve." *Wilburn v. Robinson*, 480

> F.3d 1140, 1149 (D.C.Cir. 2007); *see also Charles v. Grief,* 522 F.3d 508, 513 n. 17 (5th Cir.2008) ("even though analyzing whether *Garcetti* applies involves the consideration of factual circumstances surrounding the speech at issue, the question of whether [the plaintiff's] speech is entitled to protection is a legal conclusion properly decided at summary judgment"); *Brammer-Hoelter v. Twin Peaks Charter Acad.,* 492 F.3d 1192, 1202-03 (10th Cir.2007) (district court is to determine "whether the employee speaks 'pursuant to (his) official duties,'" "whether the subject of the speech is a matter of public concern," and "whether the employee's interest in commenting on the issue outweighs the interest of the state as employer"). Pet. App. 9a – 11a.

The Sixth Circuit concluded by saying that despite the split in the circuits, its post-*Garcetti* decisions have been consistent in holding that the application of the *Garcetti* test was a matter for the court alone, and not a jury. The Court said (605 F.3d. 345, 350-1):

> In our post-*Garcetti* opinions we have consistently described the question of whether, in a First Amendment retaliation action, a public employee's speech is protected as one of law, not one of both fact and law. *See Haynes,* 474 F.3d at 362 (citing *Taylor v. Keith,* 338 F.3d 639, 643 (6th Cir.2003) (public employee "must show that, as a matter of law, the speech at issue was protected"); *See,* 502 F.3d at 492 (citing *Connick,* 461 U.S. at 148 n. 10, 103 S.Ct. 1684) (whether an employee's speech is

> protected "is a question of law for the court to decide"). Pet. App. 11a.

Contrast the above statement with the holding of the Ninth Circuit as an example of the circuits who hold the other way (*Posey*, 546 F.3d 1121,1123):

> We conclude that, following *Garcetti*, the inquiry into whether a public employee's speech is protected by the First Amendment is no longer purely legal and presents a mixed question of fact and law.

In the context of Ms. Fox's case, she is asking this court to grant the writ so that the case will be remanded to district court with instructions to permit the case to proceed to a jury on the question of whether she was speaking "as a citizen" when she complained that her job assignment shorted the special education students the number of hours that they were to have with her. The factual analysis engaged in by the district court judge was facile and perfunctory. The district court, as quoted above, held that Ms. Fox was not speaking as a citizen based upon only two facts of relevance in the district court's opinion (Pet. App. 25a):

> There's no dispute here that the statements that Ms. Fox said she made to her supervisors involved directly her complaints about workload. She said, "I shouldn't have this number of people It's not appropriate under the law." And it related directly to the special ed students in her charge.

Absent from this record is any finding that Fox had a duty to speak as a result of her job description. The

district court judge could not have considered Ms. Fox's formal job description since that was not made a part of the record. There was no testimony from any witness to the effect that the reporting of non-compliance with the law was considered either formally or informally to be within the job duties or expected tasks of a special education teacher. The only evidence in the record which in some way addressed the issue of whether special education teachers had a duty to report non-compliance issues was the reported admonition of supervisor Kim Urbanski when she told Ms. Fox, "Susan, don't you worry about the laws, you worry about your caseload." Pet. App. 33a. A properly instructed jury could easily conclude that Ms. Fox was, indeed, speaking "as a citizen" when she voiced her complaints that the district was out of compliance with the law, since her speech was not a part of her expected duties as a special education teacher. Summary judgment was improper.

III. THIS COURT SHOULD GRANT THE WRIT IN ORDER TO REFINE THE HOLDING IN *GARCETTI* TO PROVIDE GREATER PROTECTION TO THE SPEECH OF ORDINARY PUBLIC EMPLOYEES, SUCH AS PETITIONER, AS OPPOSED TO POLICY-MAKING PUBLIC EMPLOYEES CARRYING OUT CONFIDENTIAL OR DISCRETIONARY DUTIES SUCH AS THE ASSISTANT DISTRICT ATTORNEY IN *GARCETTI*.

The ability to restrict a public employee's speech, as is permitted by this Court's holding in *Garcetti*, makes sense when the public employee is in a policy-making position or is charged with carrying out confidential or

discretionary duties on behalf of his or her public employer, like the assistant district attorney in *Garcetti*; but the rule creates odd and unjust results when applied to the millions of public employees, who, like petitioner, perform ordinary ministerial functions.

The effect of *Garcetti* is to put conscientious public employees who observe wrongdoing in a no-win position. Because *Garcetti* affords protection to speech only if one speaks "as a citizen", and because the Sixth Circuit in this case, and other circuits as well, appear to require, or at least prefer, an employee to go outside of the usual internal chain of command in order to be thought of as speaking "as a citizen", an employee wishing to report or correct wrongdoing will find it in his or her best interest to simply keep his or her mouth shut. If the employee speaks up to only his or her supervisors, there likely will be no First Amendment protection. If, on the other hand, the employee takes his or her observations to the media, or otherwise creates a public furor, the employee may very well face discipline or dismissal under the line of authorities from this Court's decision in *Pickering v. Board of Education,* 391 U.S. 563 (1968) which permits public employers to discharge employee where their speech is too disruptive to the efficient working of government.[3]

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[3] See Christie S. Totten, "QUIETING DISRUPTION THE MISTAKE OF CURTAILING PUBLIC EMPLOYEES' FREE SPEECH UNDER *GARCETTI V. CEBALLOS*", Lewis & Clerk Law Review, Vol 12 1 p 233 at 247-249.

The federal, state, and local governments employ more than 21 million people.[4] These are the people who are in the best position to observe and report the myriad foibles of government, ranging from lack of compliance issues – as is the case here – to serious criminal activity. It does not make sense that we should have a public policy which has a chilling effect on the willingness of these employees to come forward with their observations. The police officer in *See v. City of Elyria, supra,* was protected by the Sixth Circuit because he made his complaints of police corruption to an outside agency, the FBI, rather than to internal affairs. In that case he was not deterred, and his speech was protected; but how is the average public employee to know what communication will be afforded protection and what communication will not? If a person has to guess, the most likely effect will be to maintain silence.

The better approach in *Garcetti*, and one that this Court can still adopt, is to limit *Garcetti* to its facts, recognizing that the assistant district attorney in that case, as an appointed representative of the Los Angeles District Attorney, was in a special relationship with his employer which involved the assistant district attorney in policy-making and carrying out confidential assignments on behalf of his employer. *Garcetti* held that the public employer "owns" the public employee's speech if the public employee was commissioned by the employer to provide that speech. That rationale seemed

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[4] U.S. Census Bureau, 2002 Census of Governments, Compendium of Public Employment: 2002, at 1 (Sept 2004) *available at* http //www census gov/govs/www/index html

appropriate because of Ceballos's position as one of Garcetti's appointees; but petitioner suggests that one size does not fit all when it comes to public employees. Assistant District Attorney Richard Ceballos may have been commissioned by District Attorney Gil Garcetti to speak for him, and, therefore, District Attorney Garcetti could fire Ceballos when he thought that Ceballos had made inappropriate or unsubstantiated findings of police misconduct. But should the District Attorney have the ability to fire, a secretary or a paralegal if he or she raises the same issue?

Petitioner suggests that the rule in *Garcetti* be limited to public employees who are in policy-making positions or who perform confidential or discretionary duties on behalf of their employers. This approach would be consistent with this Court's decisions in the related line of First Amendment cases defining when a public employer may choose to dismiss an employee for political differences. In *Elrod v. Burns,* 427 U.S. 347 (1976) this Court held that non-policymaking, non-confidential government employees of a sheriff's office could not be fired or threatened with dismissal for the sole reason that they were not affiliated with the political party of the current sheriff. In *Branti v. Finkel,* 445 U.S. 507 (1980) this Court addressed a similar question with regard to the dismissal of assistant public defenders. This court determined that like sheriff's deputies, public defenders were not policy makers nor were they engaged in confidential duties on behalf of their employer. This court distinguished public defenders from assistant prosecutors, noting that assistant prosecutors could be considered policy-makers or confidential employees acting on behalf of the elected prosecutor who appointed them.

Petitioner's suggested reconciliation is the following: In cases where the public employee holds a policy-making position or exercises confidential duties on behalf of his or her employer, there should be a presumption that one is not speaking "as a citizen" on a matter of public concern, since such a policy-making employee will rarely, if ever, have the right to publicly express opinions which differ from the person for whom he or she was hired to speak. In cases, however, where the public employee does not hold a policy-making position or exercises confidential duties on behalf of his or her employer, the presumption should be the opposite; namely, that one is presumed to be speaking "as a citizen" when the speech is directed to a matter of public concern. The decision as to whether or not a public employee holds a policy-making position should be, as it is now under *Elrod* and *Branti*, a threshold question of law for the court. In this way, public employees whose speech is truly commissioned or "owned" by the public employer will have only limited protection, since that is what they bargained for or accepted when they took the job on behalf of a public official. Conversely, non-policy makers, like petitioner, will be afforded protection if they have the temerity to speak up to say that their employer is not in compliance with the law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CARL J. MARLINGA
Counsel of Record
MARLINGA LAW GROUP, PLLC
43550 Elizabeth Road
Clinton Township, MI 48036
586 468-1783
mail@marlingalaw.com

Attorneys for Petitioner